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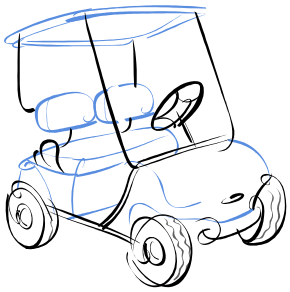
Golf Carts Are Legal On Public Highways



With an increase in gas prices, Indiana law enforcement officers are seeing an increase of golf carts on public highways. But is it legal?

Fourteen states have expressly forbidden golf carts from being operated on public highways. The California Code states that no person shall operate a golf cart on any highway except in a speed zone of 25 miles per hour or less. The Florida code allows for the operation of golf carts only on public roads that have been designated by the county or municipality for use by golf carts. In Arkansas, the law allows for golf carts to be operated on public highways designated for golf cart use if it is driven from the owner's residence to the golf course and back to the residence.

So what is the law in Indiana? While golf carts are not mentioned in Title 9 specifically, they seemingly fall under IC 9-21-9 dealing with slow moving vehicles. A slow moving vehicle is defined as "a vehicle that is (1) pulled; (2) towed; (3) self-propelled; or (4) animal-drawn; that is not under ordinary circumstances moved, operated, or driven at a speed greater than twenty-five (25) miles per hour."

While the Code does not prohibit slow moving vehicles from traveling on public highways, there are specific requirements and restrictions. Slow moving vehicles must display a triangular slow moving vehicle emblem that is to be entirely visible from the rear, day or night. Also, slow moving vehicles must display a red or amber flashing light at times when headlamps are necessary for other motor vehicles. This light must be visible from a distance of no less than 500 feet from the rear of the vehicle. Violation of any of one of these regulations is a punishable as a Class C infraction.

In addition to physical requirements, Indiana Code 9-21-5-7 provides that a person may not drive a motor vehicle at a slow speed that impedes or blocks the normal flow of traffic. "A person who is driving at a slow speed so that three (3) or more other vehicles are blocked and cannot pass on the left around the vehicle shall give right-of-way to the other vehicles by pulling off to the right of the right lane at the earliest reasonable opportunity and allowing the blocked vehicles to pass." The penalty for violating this section is a Class C infraction.

Thanks to Indiana weather, this is likely a problem that will not surface again until late spring. Notwithstanding, as the law is written now, it is legal for golf carts to be operated on public highways in Indiana. However, law enforcement should be made aware of the safety requirements necessary for golf carts to be operated on public roads.

Inside this Issue

Batson: A juror's occupation is a permissible ground for a peremptory challenge when it indicates a predisposition and is not used as a pretextual strike.

Highler v. State, (Ind. 10/4/06) Marshall Highler appeared in a Fort Wayne courtroom on charges of Rape. During jury selection Highler, who was an African American male, objected to the State's use of a peremptory strike against "Juror 92" the only African American on the jury venire. Citing *Batson*, Highler accused the State of striking "Juror 92" on the basis of race. The State responded that they had struck "Juror 92" based on answers he gave in jury selection and that he was a pastor.

During jury selection the juror told the lawyers that he had watched the Allen County Jury system. Specifically he stated: "My problem is I have sit in on some cases in Allen Co. Courtroom, and have not been pleased with the way many cases have been handled. In more than one case it seems as if there are at least two sets of law books, poor and rich, and black and white. I have seen cases decided before court ever starts, and to be real honest I prefer not to be part of your process."

When asked to respond to defense counsel's challenge, the State responded that "Juror 92" expressed he felt the system wasn't fair. She also stated that "Juror 92" was a pastor and that she always struck pastors because in her experience, pastors were inclined to be "lenient and forgiving". The trial judge agreed with the State and found that the juror's answers indicated a bias against the State which was a sufficient race neutral explanation for the strike.

Defense, on appeal, argued that the State had incorrectly excluded "Juror 92" from service based on his race and religion. The Indiana Supreme Court reviewed the three step process highlighted in *Batson v. Kentucky*, 476 U.S. 79 (1986) to determine whether the State had indeed deprived "Juror 92" of his constitutional right to serve on a jury.

Under Batson, defense counsel must present a prima facie case of discrimination before a prosecutor is required to respond to the challenge. To meet this burden defense must show that the excluded juror is a member of a cognizable group and present an inference that they were removed due to race, gender, or religion. If defense is able to establish a prima facie case of discrimination the burden shifts to the State to present a race neutral reason for the strike. The reason given by the State must be more than just a denial of wrongdoing. However, the articulated reason need not be persuasive or even plausible. If the court finds the State's reason is not based on discrimination, the burden shifts again to the defense to show purposeful discrimination by the State.

"Juror 92" was the only African American juror on the panel. The court looked to *Ashabraner v. Bowers*, 753 N.E.2d 662 (Ind. 2001) which established that the removal of the only African American juror on a panel was sufficient to establish a prima facie case of discrimination. Here the State was required to present a race neutral reason for striking "Juror 92". The Court noted that the trial judge had found the reason given for the strike was race neutral and that this was not clearly erroneous.

When a prosecutor gives multiple reasons for utilizing a peremptory challenge, the court must examine each reason. If any of the given reasons are based on purposeful discrimination, then a Batson violation is established. The second reason given by the Deputy Prosecutor for removing "Juror 92" was his occupation as a pastor which she indicated she always removed. Reviewing the response for purposeful discrimination on the basis of religion, the court noted that a strike based on occupation is not pro se unconstitutional. Citing multiple out of state cases, the Court concluded that striking a religious leader from a jury because they are apt to forgive people or would be sympathetic to a defendant is permissible. The actions of the deputy prosecutor in this case did not violate "Juror 92" constitutional rights and the conviction was affirmed.

Another Batson decision

Hardister v. State, 849 N.E.2d 563, (Ind. 2006). Besides addressing Batson, this case has a very fact specific discussion of investigatory stops and exigent circumstances which will be discussed below. At trial, the State struck several but not all African American jurors from the venire. Two African American jurors were left on the panel by the State. Hardister raised a Batson challenge alleging that the State had struck the jurors based solely on race. The trial judge found that the defense had not demonstrated a prima facie case that the Deputy Prosecutor had struck the jurors

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based on their race. The trial judge dismissed his objection without asking the State to provide a reason for their strikes.

In an unanimous decision, the Supreme Court affirmed the trial court's decision. Justice Boehm, writing for the Court stated, "Standing alone the removal of some African-American jurors by peremptory challenge does not raise an inference of discrimination...Because Hardister did not establish a prima facie case, the burden never shifted to the prosecution to provide a race-neutral explanation."

Investigatory stops and exigent circumstances

The *Hardister* case cited above included an interesting fact pattern for the Supreme Court to continue its review of investigatory stops. In this case a police officer received an anonymous tip that people were cooking drugs at 407 North Hamilton Street in Indianapolis. Following that tip two police officers traveled to the address and knocked at the front door. Hardister peered out of a window next to the door and made eye contact with one officer. The officer shined his flashlight on his badge to identify himself and asked Hardister to open the door. Another man looked out the window and then the officer heard running footsteps. The officer looked through the window and saw the two men running towards the back of the house.

Believing that the men would flee from the back of the house, both officers ran along a sidewalk towards the back. When no one ran out the back, one officer looked through the window and saw Hardister pouring a white substance, later confirmed to be cocaine, down the kitchen sink. He yelled at Hardister to stop. Hardister then fled towards the front of the residence.

In the meantime, the other officer headed towards the front. Hearing a noise on the roof the officer looked up and saw two men had climbed out a window and onto the porch overhang. When the officer asked them to kneel, a third man, Hardister's co-defendant, began to drop baggies containing cocaine on the roof and ground. One bag landed next to the officers foot. The co-defendant then jumped to the roof of the house next door. Finding no way out, he jumped back and climbed through the upstairs window. Officers eventually found Hardister hiding in the attic along with his co-defendant. After securing a search warrant, officers seized over 300 grams of cocaine, loaded weapons, and $3,300 dollars in cash from the residence. Both men were tried together and convicted of multiple drug charges.

Hardister claims that the trial court erred when it failed to suppress the drugs and other items seized from the home. On appeal, the defendant argued that when the officer knocked at the front door and Hardister ran, the officer should have left the residence. He argued that Hardister was not required to answer the door and that his flight was merely a refusal to talk. The Supreme Court disagreed. They found that even though the officer received his information based on an anonymous tip, that was sufficient for him to approach the door in a manner impliedly open for public use. While the Court agreed that Hardister was not under an obligation to speak with the officers, his unusual response of fleeing coupled with the fact the house was located in an area known for narcotics trafficking, was sufficient to provide the officers reasonable suspicion for an investigative stop. They pointed out, however, that this action would not provide exigent circumstances to enter the house without a warrant.

Next, Hardister argued that when the officers moved to the back of the house, they entered the curtilage of his home and doing so without a warrant was a Constitutional violation. Further, they argued that from their positions inside the curtilage they also violated his rights by looking through the windows of the house. The Court again disagreed with defense citing, *US v. Fisasche*, 2006 U.S. Dist Lexis 10529, " The mere fact that officers enter curtilage to conduct an otherwise lawful *Terry* stop does not ipso facto render the physical invasion of the curtilage an unlawful search." Here the officers used the sidewalk which was at best a semi-private area. Regardless of the privacy status of the sidewalk, the Court did not consider the officers' physical invasion of the area surrounding the house a search. They found the officers were merely in pursuit of fleeing suspects and looking through the windows was a reasonable effort to locate the suspects.

The Court found that when the officers saw Hardister disposing of the cocaine, that act presented exigent circumstances which justified a warrantless entry into the

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Recent Decisions (continued)

home. Under both the United States Constitution and the Indiana Constitution, the officers actions were deemed appropriate. The Court affirmed Hardister's conviction.

Intent to commit a felony must be apparent when a suspect enters a building before he can be convicted of burglary.

In *Freshwater v. State*, 853 N.E.2d 461 (Ind. 2006), the Indiana Supreme Court reminded prosecutors that to sustain a conviction for burglary the State has to prove the defendant entered a building with the intent to commit a specific crime. Otis Freshwater was seen attempting to enter a car wash. Witness, Terry Covey, was sitting on his front porch across the street from Rich's Car Wash when he noticed Freshwater pulling on the doors to the establishment. After trying several doors, Freshwater moved out of sight. After a period of time, Covey saw Freshwater inside the building. When the alarm sounded, Covey saw Freshwater run from the building. Covey then called the police.

When police arrived they saw Freshwater in the vicinity of the car wash. Freshwater was carrying a screwdriver which matched the pry marks on the car wash door. When the owner checked the building, he found nothing was missing. Freshwater was arrested and later convicted of a Class C Felony Burglary as well as being a habitual offender.

On Appeal the State argued that the circumstances indicated that Freshwater was attempting to commit theft. The State argued that Freshwater had tried several doors at night when the Car Wash was closed. He then used a pry bar to open the door and enter the building, fleeing when the alarm sounded.

While the Supreme Court agreed that Freshwater entered the building, they found that the facts were not sufficient to show he intended to commit theft. The Court pointed out that there was no evidence that Freshwater was near anything valuable in the car wash. He had not taken anything nor had he disturbed the contents of the building. Freshwater's conviction was reversed.

Recent OWI Decision

Bunting v. State, 854 N.E.2d 921 (Ind. Ct. App. October 5, 2005).

Bunting was found guilty of Operating While Intoxicated as a Class C misdemeanor after a jury trial. Bunting's attorney advised the court that Bunting and the State had stipulated to the fact that Bunting had a prior conviction for operating while intoxicated within five years. The jury was released without objection and the court entered judgment of conviction for Operating While Intoxicated as a Class D felony. Bunting argued on appeal that he was entitled to a jury trial on the issue of whether he had a prior conviction. The Court summarized the issue as "whether the State alleged the commission of a separate crime with discrete elements, or whether the State alleged the existence of a sentencing enhancement factor."

The Court held that Bunting was not charged with multiple crimes. The recidivist-sentencing factor at issue (the prior conviction) did not constitute a separate element of a separate crime. As such, Bunting waived his right to have a jury decide that he had a prior conviction by stipulating that he did in fact have a prior conviction. Also, Bunting failed to object to the dismissal of the jury. The Court held that "a party may not sit idly by, permit the court to act in a claimed erroneous manner, and subsequently attempt to take advantage of the alleged error."

Bunting also claimed that he was prejudiced by the testimony of several police officers that Bunting was intoxicated. Bunting did not comply with the portable breath test and refused the blood draw offered to him. The Court held that the State was required to rely on lay testimony regarding Bunting's intoxication because he refused to cooperate with the PBT and blood testing. "Law enforcement testimony regarding an individual's intoxication is admissible." The conviction was affirmed.